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May 25, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 14, 2004

Case No.: TIA-0203

XXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

#### *B. Procedural Background*

The Applicant was employed as a records clerk and a cubicle operator at the Oak Ridge Gaseous Diffusion Plant (the plant). She worked at the plant approximately 14 years, intermittently from 1945 to 1959.

The Applicant filed an application with OWA, requesting physician panel review of two claimed illnesses: chronic sinus infection and hand tremors. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel found that the Applicant had no significant exposure to any hazardous substances. See Physician's Panel Report at 1. Further, the Panel found no medical documentation of the claimed illnesses.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant contends that (i) the Panel incorrectly found that she was not exposed to toxic substances, (ii) the Panel incorrectly stated that the file contained no evidence of headaches, and (iii) she has additional exposure information and medical documentation that was not included in the record. See Applicant's Appeal Letter.

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

We are unable to evaluate the Applicant's appeal. As stated above, the OWA was unable to locate the record for this case. Accordingly, further consideration of this application and the appeal at the DOL is in order.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's granting of this appeal does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0203, be, and hereby is, granted.

(2) The OWA record was not available for review.  
Reconsideration of the application is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 25, 2005